No. 76-382

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE CARBORUNDUM COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This case involves a dispute concerning the proper classification under the Tariff Schedules of the United States (TSUS) of certain powdered ferrosilicon imported by petitioner. The United States Customs Service classified the ferrosilicon powder under TSUS Item 608.08 as an alloy iron or steel powder, other than a stainless steel powder. Petitioner contends that it should have been classified under TSUS Item 607.50 as a ferroalloy/ferrosilicon, upon which

the import duties are lower.[1] The Customs Court agreed with petitioner (Pet. App. 11a-20a), but the Court of Customs and Patent Appeals reversed, holding that the Custom Service's original classification had been correct (*id.*, at 1a-10a).

The ferrosilicon imported by petitioner is a "65 mesh powder," [2] composed principally of iron (75.94 percent) and silicon (16.33 percent). Lump or powder ferrosilicon, having particles of mesh size 20 or larger, is commonly used as a raw material in the manufacture of ferrous metals (Pet. App. 1a, 6a-7a). But 65 mesh ferrosilicon powder, such as that imported by petitioner, is too fine to be used for such purposes. It is imported for use in the "heavy-media separation process" (*id.*, at 1a, 7a-8a). That process involves the suspension of fine ferrosilicon particles in water to form a heavy medium slurry. Raw materials with different specific gravities are added to the slurry. The materials heavier than the water-ferrosilicon mixture sink to the bottom of the slurry while the lighter materials float on the surface. In this way the heavier raw materials are separated from the lighter (*id.*, at 1a-2a, n. 1).

On the basis of these facts, which are not disputed by petitioner, the Court of Customs and Patent Appeals correctly sustained the Customs Service's classification of the ferrosilicon powder imported by

[1] The pertinent portions of the Tariff Schedules are set forth at Pet. 2-4.

[2] A "65 mesh powder" is a powder capable of passing through a screen having 65 wires per inch.

petitioner under TSUS Item 608.08 as an alloy iron or steel powder. TSUS Item 607.50, "ferrosilicon", which petitioner contends applies to the materials in question, appears as a subheading under the more general heading "[f]erroalloys", which defines ferroalloys by means of a use test. Ferroalloys are defined as alloys of iron "which are not usefully malleable and are commonly used as raw material in the manufacture of ferrous metals * * *" and which contain more than stated percentages of certain metals. The subheading defining ferrosilicon states that ferrosilicon "is a ferroalloy which contains, by weight, not over 30 percent of manganese and over 8 percent silicon" (Pet. App. 2a-3a).

As the Court of Customs and Patent Appeals pointed out (Pet. App. 4a-5a), TSUS General Interpretative Rule 10(c)(i) requires that a subheading like "ferrosilicon" be read to be narrower in scope than a superior heading like "[f]erroalloy".[3] Thus, to be classified as ferrosilicon under TSUS Item 607.50, the material must be "commonly used as raw material in the manufacture of ferrous

[3] TSUS General Interpretative Rule 10(c)(i) provides (Pet. App. 5a):

> (c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:
>
> (i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;

metals * * *." As already noted, ferrosilicon powder, such as that imported by petitioner, cannot be used in the manufacture of ferrous metals.

Petitioner's contention that the ferrosilicon powder imported by it nevertheless should be classified under TSUS Item 607.50 rests upon three publications that petitioner claims have been recognized as containing authoritative evidence of congressional intent in connection with the TSUS. But two of those publications—*Summaries of Tariff Information* and *Brussels Nomenclature*—simply acknowledge that ferrosilicon can exist in powdered form and that, in such form, it can be used for heavy-media separation purposes (see Pet. 5-8). The third publication—*Tariff Classification Study*—states that the current provisions of the TSUS dealing with ferroalloys do not involve rate changes from the Tariff Act of 1930, which treated all ferrosilicon alike, whether in lump or powder form (see Pet. App. 9a). But this does not mean that no changes were made in the definitions of ferroalloys or ferrosilicon. The same publication states that "there is something amiss" in the treatment of ferrosilicon under the Tariff Act of 1930 (see *ibid.*). As the Court of Customs and Patent Appeals noted (*id.*, at 9a-10a):

> This dissatisfaction indicates a Congressional intent to modify the provisions for ferrosilicon which existed in the 1930 Act. Moreover, the 1930 Act did not relate provisions for ferrosilicon to the term ferroalloy as does the TSUS. We therefore fail to find support for [petitioner's] view that the ferrosilicon provisions of the TSUS were intended to be the full equivalent of the ferrosilicon provisions * * * of the Tariff Act of 1930.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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